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fact that the defendants do not produce this pottah, or attempt to account in any way for its absence. This conduct of theirs certainly lays them open to the imputation that they are purposely withholding this pottah, as it would have shown that their tenancy is not of a permanent character. *Secondly*, it is an undisputed fact in this case that the rent of the half bigha of land from which it is sought to eject the defendants has very recently been enhanced; so that no presumption in favour of the defendants from long occupation of the disputed land at a fixed and unvaried rate of rent can arise. *Thirdly*, the buildings on the disputed land are found to be but huts made of non-permanent and non-substantial materials, which can be easily removed. We therefore do not think that any presumption as to the permanent character of the original grant of the disputed land could fairly have been made in the case, or that there are any circumstances to negative the right of the landlord, as the plaintiff is admitted to be, to re-enter on the land after taking proper steps to determine the defendants' tenancy, as he has taken.

We therefore set aside the decree of the lower Appellate Court and restore that of the Court of first instance. This order carries costs in the suit in all the Courts.

C. D. P. *Appeal allowed.*

CRIMINAL REVISION.

Before Mr. Justice Prinsep and Mr. Justice Hill.

IN THE MATTER OF THE PETITION OF KOILASH CHANDRA CHAKRABARTY.

KOILASH CHANDRA CHAKRABARTY *v.* THE QUEEN EMPRESS. *

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Penal Code (*Act XLV of* 1860), *ss.* 441 *and* 456—*House breaking by night—Criminal Trespass—Intent.*

When a stranger, uninvited and without any right to be there, effects an entry in the middle of the night into the sleeping apartment of a woman, a member of a respectable household, and when an attempt is made to capture him uses great violence in his efforts to make good his

* Criminal Revision No. 163 of 1889 against order of J. G. Campbell, Esq., Session Judge of Mymensingh, dated the 2nd of February 1889, affirming the order of Baboo Bhuban Mohun Raha, Deputy Magistrate of Netrokona, dated the 31st of December 1888.

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escape, a Court should presume that the entry was made with an intent such as is provided for by s. 441 of the Penal Code.

An accused person in the middle of the night effected an entry into a house occupied by two widows, members of a respectable family. On an alarm being given, and an attempt made to capture him, he made use of great violence and effected his escape. Upon these facts he was charged with offences under ss. 456 and 323 of the Penal Code. The defence set up was an *alibi*, which was disbelieved by both the lower Courts. Neither Court found specifically what was the intention with which the accused entered the house, but it was suggested that it was probably for the purpose of prosecuting an intrigue with one of the women. There was no evidence that he had been invited by her to go there. The lower Courts convicted the accused under s. 456. It was contended that, as the prosecution had failed to prove that the entry was made with intent to commit any offence, the conviction was illegal.

Held that, under the circumstances of the case, the Court ought to presume that the entry was effected with such intent as is provided for by s. 441, and that the conviction should be upheld.

THE petitioner in this case was charged with house breaking by night in the premises of one Golak Mohun Mojumdar, and of voluntarily causing hurt to one Sarba Joya Debi under ss. 456 and 323 of the Penal Code.

The case as proved by the complainant and his witnesses was that he was awoke in the middle of the night by his cousin Sarba Joya Debi, calling out that there was a thief in the house, shaking the padlock of the *sindhuk*; that he rose and went out at once to the house in which Sarba Joya slept and found the accused coming out; that he thereupon seized him by his beard and a struggle ensued; that the accused bit him on the neck, and that on Sarba Joya coming out, and giving an alarm, the accused left him and hit her over the head with a *khota*, and then left the premises. The defence set up by the accused, who was the village doctor, was an *alibi*; but the Deputy Magistrate accepted the story of the prosecutor and disbelieved the *alibi*. The accused, by way of assigning a motive for a false charge being brought against him, alleged that the cousin of the complainant, a widow named Bhaba Sundari who slept in the same house as Sarba Joya, was unchaste, and that as he, the accused, had been interfering with her visitors, this charge had been got up against him.

The Deputy Magistrate came to the conclusion that the accused broke into the house and committed the assault charged, but that his object in breaking into the house was not theft, but probably something worse, suggesting thereby that his object was the prosecution of an intrigue with Bhaba Sundari. He accordingly convicted the accused on both charges and sentenced him to six months' rigorous imprisonment, and a fine of Rs. 25 on the first charge, and a fine of Rs. 50 on the second charge.

The accused then appealed to the Sessions Judge, and it was contended on his behalf that the conviction under s. 456 could not be sustained, inasmuch as, if he merely entered the house to prosecute an intrigue with Bhaba Sundari, there could be no criminal trespass, and the assault was committed outside the house and had nothing to do with the entry. The Sessions Judge however rejected that contention, and held that the conviction was right, as there was no evidence to show that the woman invited him or consented to his intrusion, and, when he was seized, he was guilty of extreme violence. The appeal was accordingly dismissed.

The accused then moved the High Court, under its revisional powers, upon the ground that the prosecution having failed to prove that he entered the house with intent to commit theft or any other offence, the conviction was bad.

A rule was issued which now came on for argument.

Baboo *Dwarka Nath Chuckerbutty* for the petitioner.

Mr. *Kilby* for the Crown.

The judgment of the High Court (PRINSEP and HILL, JJ.) was as follows :—

In this case the petitioner, Koilash Chandra Chakrabarty, was convicted by the Deputy Magistrate of Netrokona of the offences of house breaking by night and of voluntarily causing hurt under ss. 323 and 456 of the Penal Code, respectively, and sentenced to six months' rigorous imprisonment in respect of the first offence, and to a fine of Rs. 50 in respect of the second. He appealed to the Sessions Judge of Mymensingh, but his appeal was dismissed; and he now moves this Court to set aside the conviction and sentence under s. 456 of the Code on the

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ground that the prosecution failed to prove that he had entered the complainant's house with the intent to commit theft or any other offence.

In our opinion the conviction and sentence ought to be maintained. The facts are these: The complainant, who is apparently a person in comfortable circumstances, lives in a country village in a house which is divided into several distinct apartments. One of these he used himself with his wife and three young children to sleep in, and another was used for the same purpose by two widows, cousins of the complainant, the elder of whom was of advanced age, and the younger, whose name is Bhaba Sundari, a woman of about 20 years of age. On the night of the 12th Aughran, when the events out of which this case has arisen took place, there was no other occupant of the complainant's house but the persons I have mentioned. On that night a considerable time before daybreak, the complainant was awakened by his elder cousin, who told him that there was a thief in the house who was shaking the padlock of a *sindhuk* in his room. He got up and went out at once and found the petitioner forcing his way out of the ladies' room by pushing aside the *bera*. He seized the petitioner and a struggle ensued in the course of which the complainant was bitten by the petitioner, and the elder lady received a blow from him with a piece of bamboo which drew blood. The complainant, under these circumstances, charged the petitioner with having entered his house with intent to commit theft and with assault. The defence was an *alibi*, and the petitioner asserted that he had been falsely accused because he was supposed by the complainant to have interfered with the amours of the younger of the widows. The *alibi* has been disbelieved by both the Courts below, and there seems to be no ground for the aspersions cast on the character of Bhaba Sundari.

Neither of the Courts below has found in terms with what intent the petitioner entered the complainant's house. The Deputy Magistrate declined to believe that his object was theft, but thought that he might have been there for "some thing worse," by which, I presume, is meant the prosecution of an intrigue with the younger widow; but with reference to this aspect

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of the case the learned Judge, in disposing of the argument that the petitioner's act was not criminal as his entry was for the purpose of having connexion with Bhaba Sundari, remarks: "There is no evidence that the woman invited him in, or consented to his intrusion, and when seized he was guilty of extreme violence," and we should do wrong, were we, in the existing state of the evidence in the case, to assume, as we were invited to do by the pleader who appeared before us on behalf of the petitioner, that the intrusion of the petitioner was less distasteful to Bhaba Sundari than to any other member of the complainant's household. The learned Judge refused to accept that view, and on that ground, as we understand his judgment, declined to disturb the conviction. What we have then to deal with is the case of a man, a stranger, who uninvited and without any right whatever to be there, effects an entry in the middle of the night into the sleeping apartment of two women, members of a respectable household, and who, when the attempt is made to capture him, uses great violence in the effort to make good his escape. Under such circumstances we think a Court ought to presume that the entry was effected with an intent such as is provided for by s. 441 of the Penal Code. This is the view upon which the learned Judge has acted, and we therefore think that his decision ought to be upheld.

Conviction upheld.

H. T. H.

Before Mr. Justice Prinsep and Mr. Justice Hill.

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May 13.

KEDARNATH DAS (PETITIONER) *v.* MOHESH CHUNDER CHUCKERBUTTY AND ANOTHER (OPPOSITE PARTIES).*

Criminal Procedure Code (Act X of 1882), *s.* 195—*Sanction to prosecute—Notice to accused—Revisional power, Exercise of, by High Court.*

When Subordinate Courts grant sanction to prosecute under s. 195 of the Criminal Procedure Code, it is incumbent on them so to frame the proceedings before them as to enable the High Court to satisfy itself from the record whether the application for sanction has been properly granted or not.

* Criminal Motion No. 175 of 1889 against the order passed by Moulvie Abdul Jubber, Officiating Presidency Magistrate of Calcutta, Northern Division, dated the 11th of April 1889.

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A Magistrate, in disposing of a charge of theft, delivered the following judgment: "The charge of theft of doors and windows is not proved at all against the accused. They are acquitted."

There was no further record of the proceedings. Immediately on the judgment being delivered, the pleader appearing for the accused applied for sanction to prosecute the complainant under ss. 182 and 211 of the Penal Code. The Magistrate refused to hear the application then, on the ground that it was not the proper time fixed by him to hear applications.

The attorney for the complainant, who had expressed his willingness to have the application heard and disposed of there and then, intimated that he was prepared to show cause why sanction should not be granted, and asked that notice of any future application might be given to the complainant. The accused renewed the application the following day without notice to and in the absence of the complainant or his attorney, and the Magistrate granted the sanction asked for.

On an application to the High Court to revoke the sanction: *Held*, that the Magistrate did not exercise a proper discretion under the circumstances in neglecting to give the complainant notice of the application, and an opportunity of being heard.

Held, further, that the mere fact of the charge laid by the complainant not having been proved, was not in itself sufficient ground for granting sanction to prosecute him under ss. 182 and 211 of the Penal Code, and as, beyond the judgment of the Magistrate, there was nothing on the record to show that there were sufficient grounds for granting the sanction, it should be revoked.

THE facts which gave rise to this application were as follows:—

The petitioners, Kedarnath Das and his brother, were, according to the allegation of the petitioners, the owners of the southern portion of No. 6 Bholanath Coondoo's Lane in Calcutta, which had been allotted to them under a decree for partition passed by the High Court in its ordinary original civil jurisdiction. In an affidavit filed in support of his application Kedarnath Das stated that in the Bengali year 1293 (1886-87), Mohesh Chunder Chuckerbutty and Nobo Coomar Chuckerbutty, the opposite parties, who were their purohits, requested him and his brothers to allow them to reside in the portion of the second premises so allotted to them, promising to vacate as soon as they were asked to do so, and that he and his brother allowed them to reside there.

In his affidavit he went on to state that on the first day of March he called on the said Nobo Coomar Chuckerbutty and Mohesh Chunder Chuckerbutty, and informed them that the house

was badly in need of repairs, and that he and his brothers wished to repair the same and desired them to leave the house as soon as possible, and he placed two of his servants, Jooman and Hem Raj, in the house.

That on the 5th March, having received information that the said Nobo Coomar Chuckerbutty and Mohesh Chunder Chuckerbutty had ordered his servants to leave the house, he called there and met Nobo Coomar Chuckerbutty, who threatened to break his head if he entered the house, but that he entered the house and told his servants not to leave it, and finding that the sudder-door was wholly out of repair and about to fall in pieces, he removed the same to his dwelling-house.

That on the 9th March, having received information that his servants had been turned out of the said house, he called there, and on seeing him Nobo Coomar Chuckerbutty left the house and proceeded towards the direction of the Burtollah thannah. That he went into the house and found that the cook-room had no door, and certain doors and windows, which he had stored in one of the godowns, were missing, and he found a carpenter employed in sawing certain rafters. Seeing this he went to the thannah and informed the jemadar of what had happened, and thereupon the jemadar wrote something in a book and desired him to put his signature thereto, which he did.

That thereafter and on the same day a jemadar of police went to the house, but he did not make any enquiries into the petitioner's charge, while he made certain enquiries into a certain complaint preferred by Nobo Coomar Chuckerbutty against the petitioner, and made him produce the sudder-door which he had removed on the 5th March, but which did not in any way relate to the subject-matter of his complaint. Thereafter, the Inspector of the thannah reported to the Deputy Commissioner of Police that the petitioner's complaint was a false one, whereupon he directed the Inspector to prosecute him. Subsequently, at the instance of the said Inspector, a summons was issued against him.

That on the day of the hearing of the said complaint, he appeared in the Calcutta Police Court with his attorney, Baboo Kali Nath Mitter, who informed the Hon'ble Syed Amir Hossein,

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the Magistrate of the Northern Division of Calcutta, of the circumstances under which the complaint was made, and the action taken by the police, and that there was no judicial enquiry as to the truth or otherwise of the said complaint; thereupon the said Magistrate ordered summons to issue against Nobo Coomar Chuckerbutty and Mohesh Chunder Chuckerbutty, on the complaint preferred by the petitioner, and, accordingly summonses were issued against them, returnable on the 10th day of April instant.

That on the 10th day of April, the petitioner appeared with his attorney, Baboo Kali Nath Mitter, before Syed Abdul Jubber, who was officiating as Presidency Magistrate, and his attorney explained to the Magistrate the circumstances under which the case was placed before him, and in support of the petitioner's complaint, his attorney examined him and his brother Amrita Lal Das and also Luckhimoney, Koosum, Hurry Mati, Falgu Mistry and Netto Lall Chunder, as witnesses, but the Magistrate did not take any notes of their evidence, and after the case for the prosecution was closed delivered his judgment.

That he and his witnesses proved the existence of the doors and windows in the house at the time when Nobo Coomar Chuckerbutty and Mohesh Chunder Chuckerbutty were in possession of the same, but that he could not give and did not attempt to give any evidence of the taking thereof by Nobo Coomar Chuckerbutty and Mohesh Chunder Chuckerbutty or either of them.

That after the defendants were discharged, their pleader, Mr. Cranenburgh, applied to the Magistrate for sanction to prosecute him, when the Magistrate stated that he would not hear any application then, as it was not the proper time to hear applications. That his attorney then and there requested the Magistrate not to grant any sanction without notice to the petitioner, when the said Magistrate stated that, when the application for sanction was made to him, he would then consider whether he would issue any notice or not.

That thereafter on the 11th of April, the Magistrate, without any notice to the petitioner or his attorney, granted sanction for the prosecution of the petitioner.

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The judgment of the Magistrate, delivered on the 10th of April, was as follows:—

"*Kedarnath Das* v. *Nobo Coomar Chuckerbutty* and *Mohesh Chunder Chuckerbutty*.

Decision:

"The charge of theft of doors and windows is not proved at all against the accused. They are acquitted.

(Sd.) ABDUL JUBBER,
Offg. Presidency Magistrate."

The sanction granted by the Magistrate on the 11th April was in the following terms:—

"Sanction is hereby given to Mohesh Chunder Chuckerbutty and Nobo Coomar Chuckerbutty, under s. 195 of the Criminal Procedure Code, to prosecute Kedarnath Das, under ss. 211 and 182 of the Penal Code, for having, on the 25th March last, in the said Court, with intent to cause injury to the said complainants, instituted a criminal proceeding against them, and falsely charged them with having, on the 9th March last, in Bholanath Coondoo's Lane, committed theft of two pairs of doors two windows and 25 rafters, knowing that there was no just or lawful cause for such proceeding or charge.

11*th April* 1889.

Prosecution sanctioned.

(Sd.) A. J.

11*th April* 1889.

Issue summons, ss. 182 and 211.

(Sd.) A. J."

On the 26th of April, Mr. *M. P. Gasper* applied to the High Court (MACPHERSON and RAMPINI, JJ.), for a rule, calling on the Presidency Magistrate and the opposite parties to show cause why the order granting the sanction should not be set aside and the sanction revoked, and a rule in these terms was granted.

The application was based on a petition and affidavit of Kedarnath Das setting out the above facts.

The rule now came on to be heard.

Mr. *M. P. Gasper* and Babu *Kali Nath Mitter* in support of the rule for the petitioner.

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Baboo *Mohun Chand Mitter* for the opposite parties.

The judgment of the High Court (PRINSEP and HILL, JJ.) was as follows :—

This is a rule issued on an application made by the petitioner for the revocation of a sanction granted by the Presidency Magistrate of the Northern Division of the Town of Calcutta under s. 195, Code of Criminal Procedure, to prosecute him under ss. 182 and 211, Penal Code, in respect of certain proceedings taken by him in the Court of that Magistrate. We have nothing really amounting to any record of the proceedings in that case beyond the judgment of the Magistrate to the effect that "the charge of theft of doors and windows made by the petitioner was not proved at all against the accused." It appears that after the dismissal of that case, an application was made for sanction to prosecute the petitioner Kedarnath Das, in the presence of his attorney, and that the Magistrate declined to hear that application at once, and stated that it should be made at the hour fixed by him for the hearing of such applications. This order, we are told, was made, although the attorney for the petitioner Kedarnath Das expressed his willingness to have the application then heard in his presence, and intimated that he was prepared to oppose it. The application, it seems, was subsequently renewed in the absence of that attorney and granted.

Now, although it has been recently held by a Full Bench of this Court that service of notice before a sanction is given under s. 195 is not absolutely necessary, still, under the circumstances stated, we think that the Magistrate did not exercise a proper discretion in neglecting to give the other side through his attorney an opportunity of being heard, especially after he had intimated that he was prepared to oppose that application; and, further, we think that the Magistrate did not exercise a proper discretion because, so far as we can learn the facts of this case, he should not have readily granted the sanction asked for. Under s. 195, a discretion is granted to us to revoke any sanction which may have been granted by any authority, such as a Presidency Magistrate of Calcutta, subordinate to us, and therefore the law imposes upon us a responsibility in such matters to consider

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whether the application has been properly granted or not. It is therefore incumbent upon the Subordinate Courts so to frame the proceedings before them as to satisfy this Court as a Court of revision. In the present case we have absolutely nothing before us except the judgment of the Magistrate recording that the charge preferred by the petitioner Kedarnath was not proved. Now, the fact that that charge was not proved was in itself no sufficient ground for granting the accused in that case permission to prosecute the complainant with having intentionally and falsely charged him with such offence. Under such circumstances, we think that there were no sufficient grounds for granting the sanction to prosecute the petitioner, and that that order should accordingly be revoked.

H. T. H. *Rule made absolute.*

Before Mr. Justice Trevelyan and Mr. Justice Beverley.

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May 20.

IN THE MATTER OF BICHITRANUND DASS AND OTHERS (PETITIONERS) v. BHUGRUT PERAI (OPPOSITE PARTY).

IN THE MATTER OF BICHITRANUND DASS AND OTHERS (PETITIONERS) v. DUKHAI JANA (OPPOSITE PARTY).*

Jurisdiction of Criminal Court—Tributary Mehals—Kheonjur—"Local Area"—Code of Criminal Procedure (Act X of 1882) ss. 182 *and* 531.

The Penal Code and Criminal Procedure Code have no application to the Tributary Mehal of Kheonjur which is on precisely the same footing in that respect as Mohurbhunj.

Certain persons, officers of the Maharajah of Kheonjur, one of whom was a resident of the Cuttack district, and the others residents of Kheonjur, were charged before the Deputy Magistrate of Tajpore with certain offences under the Penal Code. They were convicted, and on appeal to the Sessions Judge, the conviction was upheld. It was found by the Sessions Judge that the scene of the occurrence which gave rise to the charges was within the Territory of Kheonjur.

Held, that the Deputy Magistrate and Sessions Judge had no jurisdiction to try the case, and that the conviction must be set aside.

* Criminal Motions Nos. 4 and 6 of 1889 against the order passed by J. B. Worgan, Esquire, Sessions Judge of Cuttack, dated the 27th of September 1888, modifying the order passed by J. S. Davidson, Esquire, Deputy Magistrate of Tajpore, dated the 6th of February 1888.

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Held, further, that ss. 182 and 531 of the Criminal Procedure Code had no application to the case.

The words "local area" used in s. 182 only apply to a "local area" over which the Criminal Procedure Code applies, and not to a local area in a foreign country or in other portions of the British Empire to which the Code has no application; and similarly s. 531 only refers to districts, divisions, sub-divisions and local areas governed by the Code of Criminal Procedure.

THE only question raised at the hearing of these two rules was whether the Deputy Magistrate of Tajpore and the Sessions Judge of Cuttack had jurisdiction to try the accused for offences which were alleged and found by the Sessions Judge to have been committed in Kheonjur, a tributary mehal adjoining the district of Cuttack.

The facts of the two cases were practically identical, the principal accused person in both cases being Bichitranund Dass, one of the officers of the Maharajah of Kheonjur, and it is sufficient for the purpose of this report to state the facts which gave rise to the issue of the rule in the latter of the two motions.

The prosecution alleged that Bichitranund Dass, who was the peshkar of Anundpore, accompanied by the other accused, all servants of the Maharajah of Kheonjur, came with a large number of men on to lands situate in Sukinda, which is within the district of Cuttack and within the jurisdiction of the Sub-divisional Magistrate of Tajpore, and proceeded to break *mokha* from the *baris* of Dukhai Jana and others, to cut dhan on the lands, and also to cut a *dhandi* which served as a boundary or line of demarcation between Sukinda and Kheonjur. Thereupon certain men of Sukinda came up and protested against the trespass, and this resulted in some nine of the latter being seized by Bichitranund and the other accused and taken off to Anundpore in Kheonjur when they were taken before the Manager. That official sent them down to be tried by the Sub-divisional Magistrate of Tajpore by whom they were discharged. It was alleged by the Sukinda people that they were cutting their *sua* crops on their own land and that their crops were carried off by the Kheonjur party.

After the nine men had been discharged, a complaint was made before the Deputy Magistrate of Tajpore against Bichitranund and the others charging them with offences under

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ss. 147 and 342 of the Penal Code. The principal question raised in the case was whether the scene of the occurrence was situate within Sukinda or Kheonjur, and on behalf of the accused it was contended that, as the occurrence took place in Kheonjur, the Court had no jurisdiction to try them. The Deputy Magistrate found that Bichitranund, being a resident of Sukinda, and therefore a British subject, was liable to be tried by him, whether the occurrence took place in Kheonjur or not.

Upon the principal question he found that the *sua* lands claimed by the Sukinda people were actually in their possession and formed part of Sukinda; that the accused entered upon their lands with intent to deprive the Sukinda people of them; that they also entered the *baris* of Dukhai Jana and others and committed certain acts of violence therein, such as trampling down the hedges, breaking the *mokha* crops, and cutting the *dhandi;* and that they arrested nine Sukinda men within the limits of Mulasar Mouza in Sukinda and therefore in British territory.

Upon these findings he convicted the accused of offences under ss. 147 and 342 of the Penal Code and fined Bichitranund Dass Rs. 300, Karmokar Patnaik Rs. 100, and the other accused Rs. 20 each with an alternative of one month's rigorous imprisonment each. He further directed all the accused to execute bonds in various sums to keep the peace for a period of three years.

Against that conviction Bichitranund Dass and Karmokar Patnaik appealed to the Sessions Judge, who upheld the conviction but reduced the amount of the fines.

The material portion of the judgment of the Sessions Judge was as follows:—

"The facts of this case are fully stated in the judgment of the lower Court. The allegation of the prosecution is that the riot was committed in the "*baris*" or homesteads of certain ryots in Mouza Mulasar in Sukinda, in the jurisdiction of the Sub-divisional Magistrate of Tajpore in the district of Cuttack, by the appellants and others, of whom the appellant Bichitranund is a man of the Cuttack district, whilst the appellant Karmokar is a man of the Kheonjur territory.

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The wrongful confinement or seizure of the complainant and his companions is also alleged to have occurred in or close to the said *baris*. About this the Deputy Magistrate was not satisfied, he being of opinion that the arrests were made on the *sua* lands, the cutting of the crops on which led to the same. From these lands he thought the Mulasar men were taken by the appellants to the "Gat" or cattle-fold near the *baris*. He did not pass separate sentences for the riot and the wrongful confinement, but for the two offences jointly. * * * * The case for the appellants is that they were not present, but Bichitranund says that the *sua* lands are not in Mulasar but in Chanchaniapal, a mouza in Kheonjur, adjoining Mulasar, and the arrest was admitted by certain of his co-accused in the case on that ground, it being their allegati on that it was effected on the *sua* lands, the distance of which from the *baris* is stated to be a quarter of a mile or something less. The exact position of these fields might, I think, have been with advantage ascertained and shown on a sketch-map, it being a matter of importance to know their distance from the *busti* of Mulasar, as well as from the nearest *busti* in the Mouza Chanchaniapal." [The Judge then proceeded to go into the geographical position of the *sua* lands and other facts immaterial for the purpose of this report, and came to the conclusion that it had not been proved by the prosecution that the *sua* lands were in Sukinda.] He then continued :—

"We are now brought to the other part of the case, *viz.*, the seizure in the *sua* fields, and to the question of jurisdiction, the first point being whether the Penal Code is or is not applicable to the case. It was said for the appellants it is not, because Kheonjur is not in British India. It was said for the prosecution that this statement is incorrect and that Kheonjur is not out of British India, it being under Regulation XII of 1805 a part of Zillah Cuttack. Reference was made for the prosecution to the cases of *Hursee Mohapatro* v. *Dinobundo Patro* (1), and *The Empress* v. *Keshub Mohajan* (2), the latter being a Full Bench case deciding that Mohurbunj is not in British India. The question of the other Tributary mehals being or not being in British India was not settled by that case, special features being found in respect

(1) I. L. R., 7 Cal., 523. (2) I. L. R., 8 Cal., 985.

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of Mohurbunj. The view taken on the general question would, I think, not support a finding that the Tributary mehals are not within the limits of British India, and I shall proceed on the view that they are within those limits, and that Kheonjur is so situated and thus is not to be regarded as a foreign state under the Extradition Act of 1879. At the same time, I do not consider that the Penal Code can be held to be in force in Kheonjur, inasmuch as the exemption thereof from the Regulation Criminal Law given to this mehal by Regulation XIII of 1805 was not annulled by the Penal Code. What law is in force in Kheonjur does not appear. Criminal jurisdiction is exercised by the Superintendent as a Sessions Judge, and by the Magistrates of Cuttack, Balasore, and Puri, as Assistant Superintendents; and in a Mohurbunj case tried by me at the May Sessions at Balasore, it was stated that the spirit of the Codes was followed in Mohurbunj, and this is no doubt true of the other Tributary mehals.

"Taking it that if the arrest occurred at a place in which the Penal Code, and equally the Criminal Procedure Code, were not in force, the question of jurisdiction demands settlement, it will be well to see how the matter of *venue* stands. If the *sua* fields be held to be in Sukinda, both of the appellants were, and are, liable under s. 2 of the Penal Code. All that the one of them who belongs to Kheonjur could claim might be to make an objection as to the matter of his arrest by calling himself a subject of a foreign state. but as I have already held Kheonjur not to be a foreign state, no plea of this kind can be entertained. The question is thus only whether Mr. Davidson's decision in the matter of *venue* was justified. It was said for the appellants that it was not, as he made no attempt to re-lay the boundary line as shown by the map to which his decision may very possibly be contrary, and that in acting as he did he assumed a power which is by law vested in the Superintendent and no one else, *viz.*, by Act XX of 1850. I have already shown that the dispute would appear to have involved a very nice question as regards position, and I think myself that this question demanded a more accurate method of determination than that which was adopted by Mr. Davidson, which seems to have left the point

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in doubt. The fact of the Mulasar men having held the fields would not give the Deputy Magistrate jurisdiction and was hardly relevant to the issue, the position of the lands being one to offer temptation for encroachment. I think that it was a matter in which the onus was on the prosecution and that it was not met. I do not think that I can properly uphold the finding that the *sua* fields are within Sukinda and not in Kheonjur. The point is open to doubt, and of this doubt I think the appellants can claim the benefit.

"It being now held that the scene of the arrests was not proved to be in Sukinda, and that if in Kheonjur, it was in a place not under the operation of the Penal Code, though in British India, the question is how did Mr. Davidson's jurisdiction stand? As regards the Kheonjur appellant Karmakar Patnaik, I do not think that he is, under the view taken by me, differently placed from the other appellant, who is a man of Cuttack. If Kheonjur is in British India, he is as much a native Indian subject of Her Majesty as is Bichitranund. It cannot however be said that s. 188 of the Criminal Procedure Code would apply, nor was it contended. Section 531 was the section on which (with s. 182) the prosecution relies as making the conviction legally sound; and it was urged that the case was one capable of inquiry and trial within either the local area of Sukinda, *i.e.*, Tajpore or of Kheonjur, the latter of which is, it was said, a Sessions division existing at the time of the passing of the present Criminal Procedure Code. Under s. 182, if it was uncertain in which of the areas the offences were committed, it was, it was argued, open to the prosecution to proceed in either the Tajpore Magistrate's or in the Superintendent's Court, and either Court could enquire into and try the case. Against this it was said that Kheonjur cannot be considered to be a 'local area' within the meaning of the Code, and that the alternative procedure was thus not open as contended.

"As to this matter, I do not find any definition of the phrase local area' in the law. The point came before me for consideration in the Mohurbunj trial alluded to, and the view that I then took of it was that 'local areas' meant areas within British India. It was said that they are not this, but areas within

which the Criminal Codes are in force, and as the Penal Code is not in force in Kheonjur it cannot be held to be a local area. I was not shown any authority for this restricted view of the words 'local area,' and I should not in the absence thereof be disposed to alter the view adopted before. I think that the law is not contravened thereby.

"I thus think that Mr. Davidson was not without jurisdiction as regards either of the appellants, as respects what they are alleged to have done at the *sua* fields, and that as he had jurisdiction he was justified in applying the Penal Code.

"I have not said anything as to the objection of Mr. Davidson's re-laying or defining the boundary being, as alleged, *ultra vires* or not, because on the view taken by me this point of law need not be gone into. My attention was drawn by Baboo H. B. Bose to a judgment of Mr. Macpherson of the 23rd of May 1877 in R. A. No. 116 of 1875, *Bamadev Bhramachari* v. *Dasrathi Nack*, showing that it was held by him that a Civil Court could not settle its own jurisdiction against a Tributary mehal, and I should doubt whether a Magistrate could do so any more. But if s. 182 applies, the Deputy Magistrate's action in this respect is of no importance as regards the conviction.

"I may say that even if the *sua* fields were in Kheonjur, I consider it could not be held that there was no offence, if the application of the Penal Code was legal. The right of private defence would not justify what the appellants did.

"An objection was made that a request made for recall of the witnesses for further cross-examination on the 19th of December was disallowed, as also a repetition of the request made on the 9th of January. Looking at the cross-examination which had preceded this petition, and the nature of the evidence, which indicated clearly enough the charge which was made after it was concluded, I do not think that the Deputy Magistrate was wrong in refusing the application, and I do not think that anything could be gained by a remand now. I should thus not interfere on this ground. The conviction is accordingly upheld, as also the order for security, and the appeal to this extent dismissed. In view however of the uncertainty of the

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real position of the land, I think the sentence is capable of mitigation, and I reduce it in the case of appellant Bichitranund to Rs. 200, and of Karmokar to Rs. 60 fine, in default the term of imprisonment to be as ordered by the lower Court."

Against the order of the Sessions Judge, the petitioners moved the High Court, and a rule was issued which now came on for hearing.

Baboo *Mohesh Chandra Chowdhry*, Baboo *Umbica Churn Bose*, Baboo *Abinash Chandra Banerjee* and Baboo *Karuna Sindhu Mukerjee* for the petitioners.

The *Deputy Legal Remembrancer* (Mr. *Kilby*) for the Crown.

The application was based on a petition setting out the above facts, and the principal grounds upon which it was contended that the decisions of the lower Courts were erroneous and the conviction bad were as follows :—

1. That the Courts below were wrong in holding that the territory of Kheonjur, which is a Tributary state, formed part of British India.

2. That the Sessions Judge ought to have held that the order of the Deputy Magistrate was liable to be quashed for want of jurisdiction.

3. That the Sessions Judge was wrong in holding that under s. 182 of the Criminal Procedure Code, the Deputy Magistrate of Tajpore had jurisdiction to try the case even if the "*sua* land" were held to be within the territory of Kheonjur.

4. That the interpretation put upon the phrase "local area" in s. 182 of the Criminal Procedure Code by the lower Court was not correct, and that that section had no application to the case.

5. That the Sessions Judge ought to have held that the Deputy Magistrate had not the power to assume jurisdiction against a tributary mehal.

6. For that the *sua* lands having been found to be situate within the Kheonjur state, and that the complainant and the people of Sukinda were taking crops from the said land, the

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Court below ought to have held that the petitioners were justified in arresting the trespassers and taking them to the Sub-divisional Officer, and that there was no offence within the meaning of s. 342 or under s. 379 of the Penal Code.

The judgment of the High Court (TREVELYAN and BEVERLEY, JJ.) was as follows :—

In this case we think it clear that the conviction cannot stand. The alleged offence was unquestionably and admittedly, if it was committed at all, committed within Kheonjur. Now there seems to be no question that Kheonjur and Mohurbunj are tributary mehals standing exactly upon the same footing with regard to their relations with the British Government and their independence. This is apparent from the treaty engagements executed by the Rajahs of these respective territories which are set out at pages 184 to 187 of the 1st volume of Aitchison's Treaties. A comparison of these two engagements shows that they are practically identical in terms, and the learned counsel who appears for the Crown has not disputed that proposition. Now this place, Kheonjur being in this respect the same as Mohurbunj, we have to consider the effect of the Full Bench case *The Empress* v. *Keshub Mohajan* (1), and the cases that gave rise to that reference to the Full Bench. There is no doubt of this, that the result of the Full Bench case and the other cases is this, that whether Mohurbunj was a foreign territory or not, the Criminal Procedure Code and the Penal Code had no application to it. It therefore follows by parity of reasoning that in the case of Kheonjur these Codes have no application. This proposition also was not disputed by Mr. Kilby who appears for the Crown. Mr. Kilby very properly pointed out his position, and told us that he found it was impossible to support the judgment in the face of these considerations. That being so, and these Codes not applying, it follows that the Magistrate before whom this case first came for decision, and the Sessions Judge to whom an appeal was made from the decision of the Magistrate, had no jurisdiction to try the case. It follows also that the Sessions Judge was wrong in his judgment where he considered that s. 182 of the Criminal Procedure Code applied. That section clearly does not

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apply for two reasons. In the first place the words "local area" in that section must mean a local area over which this particular Code applies, and it would not refer to a local area in a foreign country, or in a portion of the British Empire to which this Code has no application. The whole purport of the section makes that clear. Then again that section in reality intends to provide for the difficulty which would arise where there is a conflict between different areas, in order to prevent an accused person getting off entirely, because there may be some doubt as to what particular Magistrate has jurisdiction to try the case. Each portion of the section refers to this conflict. The Sessions Judge finds as a fact that this particular offence was committed in this local area of Kheonjur, and it is impossible to find from his judgment with what other local area that local area in Kheonjur conflicts. For this reason also s. 182 has no application to the present case. The other section to which the Sessions Judge refers, *viz.*, s. 531, is equally inapplicable. That section, of course, only refers to districts, divisions, sub-divisions and local areas governed by the Code of Criminal Procedure, and for similar reasons it does not apply. In our opinion the place where the offence is said to have been committed was not within the jurisdiction of the Magistrate or of the Sessions Judge.

For these reasons we think it is quite clear that the judgment is wrong. We set aside the convictions and direct that the fines, if realised, be refunded.

H. T. H. *Rule made absolute and conviction quashed.*